PD-1300-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-1300-16

IN THE COURT OF

CRIMINAL APPEALS OF

THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
4/18/2017
ABEL ACOSTA, CLERK

ELVIS RAMIREZ-TAMAYO,

APPELLANT/RESPONDENT,

THE STATE OF TEXAS,

APPELLEE/PETITIONER.

Appealed from the 108th District Court of
Potter County, Texas
Cause No. 69,523-E
And
07-15-000419-CR in
the Seventh Court of
Appeals of Texas

APPELLANT/RESPONDENT'S BRIEF

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No. PD-1300-16

ELVIS RAMIREZ-TAMAYO,
Appellant,

VS.

THE STATE OF TEXAS,
Appellee,

LIST OF ALL PARTIES

In order that the members of the Court may determine disqualification in or recusal pursuant to T.R.A.P. 74(c), Appellant certifies that the following is a complete list of parties:

Judge Presiding:	Honorable Douglas Woodburn 108th District Court 501 S. Fillmore St., Ste. 4A Amarillo, Texas 79101
Appellant:	Elvis Ramirez-Tamayo 9865 Nicaragua Drive Cutler Bay, Florida 33189
Attorney for Appellant At Trial:	Adrian Castillo 2414 Line Ave. Amarillo, Texas 79105-1605
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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ELVIS RAMIREZ-TAMAYO, Appellant

v.

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* * * * *

APPELLANT'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now Appellant/Respondent Elvis Ramirez-Tamayo, and respectfully presents to this Court his brief on the merits.

STATEMENT ON ORAL ARGUMENT

Oral argument was requested and denied in this case.

STATEMENT OF THE CASE

On November 9, 2015, Appellant argued a Motion to Suppress evidence of marijuana found in his vehicle as a result of a traffic stop.[1][2] The Court denied

[1] The Reporter's record consists of seven volumes. The reporter's record will be referred to as "RR-page#.line#".
[2] RR 2-6.21-22

Appellant's Motion to Suppress.[3] After the Court's ruling, Appellant on the same day entered a plea of guilty.[4] The Court sentenced Appellant to four years in the Texas Department of Corrections, Institutional Division, with a suspended sentence.[5] Appellant appealed that ruling on the motion to suppress. The court of appeals reversed, holding that the "totality of the circumstances at hand did not rise to the level of reasonable suspicion under the particular circumstances at hand," and that there was no "reasonable suspicion to prolong [Mr. Ramirez-Tamayo]'s detention" once the officer ended the purpose of the original traffic stop (for going 78 m.p.h. in a 75 m.p.h. zone) by issuing a warning.[6]

ISSUES PRESENTED

THE IDIOM WAS CORRECT, BLIND SQUIRRELS DO FIND NUTS (or, the Trial Court had no details on what "training and experience" the deputy had to base his "reasonable suspicion" on.)

STATEMENT OF FACTS

On September 23, 2014 Appellant was pulled over by Deputy Casey Simpson while traveling on I-40.[7] Deputy Simpson testified that he

1 The Clerk's record consists of 1 volume and will be referred to as "CR page #"

[3] RR 2-52.17-22.
[4] RR 3-6.11-15.
[5] RR 3-12.1-7.
[6] Ramirez-Tamayo v. State, No. 07-15-00419-CR, slip op. at 3, 22 (Tex. App.—Amarillo Oct. 5, 2016) (pet. filed) (hereinafter "Slip op.").
[7] RR 2-9.10-13.

first observed Appellant's car because he believed the vehicle to be traveling above the speed limit.[8] After checking the vehicle's speed against the radar detector, it was determined that Appellant's vehicle was only traveling three miles above the posted speed limit at seventy-eight miles per hour, where the posted speed limit was seventy-five miles per hour.[9] Deputy Simpson testified that his initial observation of Appellant's speed was made without regard for the speed at which other vehicles were traveling.[10]

After confirming that Appellant's vehicle was speeding, Deputy Simpson turned on his red and blue lights and Appellant immediately pulled over.[11] Deputy Simpson approached Appellant's vehicle on the passenger side for his own safety.[12] Appellant opened the passenger-side door as opposed to rolling down the window to speak with the deputy.[13]

Deputy Simpson observed that Appellant was driving a rental car,[14] and attempted to ask Appellant where he was traveling,[15] Because of a language barrier, Appellant and deputy Simpson were unable to have a full conversation.[16]

After Appellant opened the door, Deputy Simpson testified that he noticed a

[8] RR 2-9.14-16.
[9] RR 2-28.24-29.3.
[10] RR 2-29.4-11.
[11] RR 2- 10.19-11.1.
[12] RR 2-11.7-14.
[13] RR 2-12.2-7.
[14] RR 2-15.21-24
[15] RR 2-35.14-25
[16] RR 2-25.4-15.

strong odor of cologne and cigarette smoke.[17] Deputy Simpson also noted that Appellant appeared nervous and excited.[18]

When questioned further by the State, Deputy Simpson affirmed that most individuals exhibit some nervous behavior when stopped by an officer.[19] To differentiate between "average" nervousness and the nervousness exhibited by Appellant, Deputy Simpson explained that "[Appellant] was sitting in the front passenger seat of [Deputy Simpson's] patrol vehicle . . . and he could never get comfortable." [20]

After issuing Appellant a warning for speeding, Deputy Simpson unlawfully extended the stop by asking appellant several questions about drugs and weapons in the vehicle that had nothing to do with the initial purpose of the stop. [21]Deputy Simpson then asked to search Appellant's vehicle.[22] Due to the language barrier, the deputy could not determine whether Appellant was consenting to a search,[23] so he did not search the vehicle but used a drug dog to sniff around Appellant's vehicle.[24] The dog, which had arrived on the scene, walked around the vehicle and responded in such a way that indicated that drugs were present.[25] Considering the

[17] RR 2-22.5-7, RR 2-22.25.
[18] RR 2-23.17-19.
[19] RR 2- 23.20-22.
[20] RR 2-24.11-14.
[21] RR2-42.18
[22] RR 2-26.14-16.
[23] RR 2-27.1-6,
[24] RR 2-27.10-12.
[25] RR 2-27.13-23.

dog's response to provide probable cause, Deputy Simpson then searched the vehicle and discovered 19.62 pounds of marijuana in Appellant's vehicle.[26]

SUMMARY OF THE ARGUMENT

Every day, thousands of Texans are detained on Texas Highways for relatively minor infractions of traffic laws. Officers use these detentions to attempt to detect evidence of other illegal activity, most commonly drug trafficking. Courts have recognized that "training and experience" can assist an officer in detecting such illicit activity not apparent to an untrained observer.[27] Police have seized on that phrase since the late 1970's and have opined everything from driving carefully[28] to having overly clean[29] or overly dirty cars[30], to making eye contact[31] or not making eye contact[32] with officers are all evidence of suspicious activity. Prosecutors, as a result, have become lax in their burden of proving what "training and experience" has led each officer in each particular instance to scattering a citizen's belongings out into the roadside ditch in an attempt to validate their conclusions and find the proverbial "nut". Detailed records are not kept of how many people are wrongfully detained during these detentions. That leaves citizens

[26] RR 2-21.22-25.
[27] Brown v. Texas, 443 U.S. 47, 51 (1979)
[28] Contreras v. State, 309 S.W.3d 168(Tex. App.—Amarillo 2010, pet. ref'd)
[29], Contreras, supra at 171
[30] Deschenes v. State, 253 S.W.3d 374, 383 (Tex. App.—Amarillo 2008, pet. ref'd)
[31] Gonzalez-Galindo v. State, 306 S.W.3d 893, 895-96 (Tex. App.—Amarillo 2010, pet ref'd)
[32] Gonzalez-Galindo v. State, 306 S.W.3d at 896

like appellant to stand up for the rights of those who are wrongfully detained. Deputy Simpson, without articulation on what training and experience he relied on in this stop, is the "blind squirrel." In this instance, his actions were not constitutional. The Seventh Court of Appeals agreed with Appellant when they reversed the judgment of conviction and remanded to the trial court, finding that "the deputy lacked reasonable suspicion to prolong appellant's detention once he decided to end the purpose of the original stop by opting to give appellant a warning ticket."[33] In their opinion, they noted that "offering conclusory opinions derived from an unknown data base does not instill us with confidence about their reliability and accuracy." [34]

The SPA, arguing on behalf of the 47th District Attorney, now asks this Court to go back to the trial court and testify or "fill in the blanks" for the State's witness and speculate as to what "training and experience" Deputy Simpson had.

[33] Slip op. at 22.
[34] Slip op at 21.

POINT OF ERROR

THE IDIOM WAS CORRECT, BLIND SQUIRRELS DO FIND NUTS (or, the Trial Court had no details on what "training and experience" the deputy had to base his "reasonable suspicion" on.)

Standard of Review

The standard of review for a trial court's decision to deny a motion to suppress requires a bifurcated test giving "almost total deference to a trial court's determination of historical facts" and reviewing de novo the court's application of the law of search and seizure. [35]The present issue concerns the facts of the case. Despite the extremely deferential standard stated above, because the trial court did not make explicit findings of historical fact, the evidence must instead be viewed in the light most favorable to the trial court's finding. [36]

Law and Argument

Rodriguez presents a second question for consideration in finding that the extension of a stop for a dog sniff can be justified where the sniff is independently supported by individualized suspicion.[37]

Deputy Simpson did not have reasonable suspicion of criminal activity prior to issuing the warning. Deputy Simpson testified that he considered Appellant's use

[35] Carmouche v. State, 10 S.W.3d 323, 327 (Tex.Crim.App. 2000), citing Guzman v. State, 955 S.W.2d 85, 88-89 (Tex.Crim.App.1997).
[36] Carmouche, 10 S.W.3d, at 327-28; see also State v. Ballard, 987 S.W.2d 889 (Tex.Crim.App. 1999); State v. Munoz, 991 S.W.2d 818, 821 (Tex.Crim.App. 1999).
[37] Rodriguez v. United States, 135 S. Ct. 1609, 1616 (2015)

of a rental car, decision to open the door as opposed to roll down the window, use of cologne, smell of cigarette smoke, and nervousness as reasonable suspicion of drug trafficking prior to walking the dog around Appellant's vehicle. [38]

For the officer to extend the stop to conduct a dog sniff of the vehicle, the officer must express a "reasonable, articulable suspicion that criminal activity is afoot."[39] The relevant facts provided by the officer must, by looking at the totality of the circumstances, show a particularized and objective basis for suspecting legal wrongdoing. [40]

The first factor that Deputy Simpson pointed to was the fact that Appellant was driving a rental vehicle. As courts have previously stated, the fact that an individual is driving a rental car is of little value to the reasonable-suspicion evaluation. [41]

Though rental cars are a tool used by drug traffickers, it is not specific enough to eliminate a significant portion of the general population.

The second factor that Deputy Simpson pointed to was that Appellant opened the car door instead of rolling down the window. Despite the officer's testimony that drugs in the panel of a vehicle can render electric windows inoperable, Deputy Simpson did not have concrete evidence that the electric

[38] RR 2-26.3- 10.
[39] Illinois v. Wardlow, 528 U.S. 119 (2000)
[40] United States v. Arvizu, 534 U.S. 266, 273 (2002).
[41] See United States v. Williams, 808 F.3d 238, 247 (4th Cir. 2015).

windows did not work.[42] Courts have required concrete evidence to establish reasonable suspicion, such as alterations to gas tanks or tires. [43]Though Appellant did not roll down his windows, Deputy Simpson did not see any damage or physical alterations to the car that would provide concrete evidence of criminal activity.

Third, Deputy Simpson asserted that his reasonable suspicion was based on the smells of cologne and cigarette smoke in the vehicle, which he believed to be an attempt to cover the smell of marijuana.[44] Courts have considered "strong masking odors" to be a factor that can contribute to a reasonable suspicion calculus.[45] Deputy Simpson failed to articulate that appellant was not a smoker and was just using the cigarettes as a masking agent. He did not articulate whether the cologne was on appellant or was sprayed directly onto the car. The State makes much of Appellant smoking in a rental car that was designated non-smoking, but fails to concede that masking agents might be an attempt to conceal evidence that the rental agreement had been broken by violation of the smoking provision.

Finally, the State asserted that the officer had reasonable suspicion to prolong the stop because of Appellant's nervousness. However, each example provided by the officer of Appellant's nervousness referenced times after Deputy

[42] RR 2-12.19-21
[43] United States v. Davis, 620 Fed.Appx. 295, 299 (5th Cir. 2015); see also United States v. Estrada, 459 F.3d 627 (5th Cir. 2006).
[44] RR 2-22.5-7, 25.
[45] United States v. Ludwig, 641 F.3d 1243, 1248 (10th Cir. 2011).

Simpson had already issued the warning and the purpose for the stop had already been effectuated. For instance, Deputy Simpson noted that Appellant was unable to sit still or "get comfortable" when sitting in the officer's patrol car and answering questions.[46] This incident occurred after Appellant was issued a warning for his speeding and the purpose for the stop had been effectuated. [47]Therefore, it may not be used in a reasonable suspicion analysis as the officer's suspicion must have been fully cognized prior to the completion of the purpose of the stop.[48] Further, courts have consistently held that nervousness, even when coupled with additional intangible factors, is not sufficient to reaching the standard of reasonable suspicion. [49]

Courts have held that the greater the training and experience of the law enforcement officer, the more likely it is that he will be able to perceive and articulate meaning in conduct which would not arouse suspicion in an untrained observer,[50] In this case, we have very little information on deputy Simpson other than he worked as a jailer for a year or two and had worked for the Potter County Sheriff's office for nine years. We were not told what his duties in each of those jobs were, and despite him alleging that he had been assigned to the Criminal

[46] RR 2-24.6-14.
[47] RR 2- 24.15-17.
[48] See Rodriguez, 135 S.Ct., at 1616.
[49] See, e.g., Williams, 808 F.3d, at 248; United States v. Richardson, 385 F.3d 625, 630 (6th Cir. 2004).
[50] United States v. Buenaventura-Ariza, 615 F.2d 29 (2nd Cir. 1980).

Intelligence Unit, we have no indication of how long he had been assigned to that job, what training he had to qualify him for that job, or even what that job entailed.

Since we have no information on what "training and experience" Deputy Simpson had relied on, we can only assume that he is indeed the "blind squirrel." Even though on this occasion, Deputy Simpson was right and found the "nut" squirrelled away in the door panels of a rental vehicle on Interstate 40, this court cannot support his assertion that he had developed reasonable suspicion of specific criminal activity prior to the purpose for the original stop being completed.

Viewing the facts in light most favorable to the ruling of the court, there is insufficient evidence to support independent reasonable suspicion that Appellant was engaged in criminal activity beyond the purpose for which the stop was made.

CONCLUSION AND PRAYER

Since the source of the error lies solely on the State, since the curative measures were as basic as possible, and since the error caused Appellant to forfeit his right to trial by a jury of his peers and enter a plea of guilty, this Court should uphold the Opinion of the Seventh Court of Appeals and find that the trial court abused its discretion in denying Appellant's Motion to Suppress.

Based on the arguments above, Appellant respectfully prays that upon appellate review, this Court should affirm the Seventh Court of Appeals, find that the trial court abused its discretion in denying Appellant's Motion to Suppress, that appellant was harmed by such denial, reverse the conviction, suppress all evidence seized as a result of the unlawful search and remand for a new trial on the merits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Steven M. Denny, attorney for the Appellant, certify that a true and correct copy of the foregoing brief has been provided to the Attorney for the State on this the 17 day of April, 20_17 .

/s/Steven Denny
STEVEN M. DENNY

CERTIFICATE OF COMPLIANCE

I, Steven M. Denny, attorney for the Appellant, certify that this brief complies with T.R.A.P. 9.4 and contains 2,341 words as calculated by Microsoft Word in the included content as described in T.R.A.P 9.4(1) on this the 17 day of April, 20_17 .

/s/ Steven Denny
STEVEN M. DENNY